

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What, if any, is the nature and extent of the claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent as a parts loader in 1973. Her job with respondent required she work with parts weighing up to ten (10) pounds. These parts were stored overhead and claimant was required to reach and bend, twist and turn while working the job. In December, 1990, claimant slipped and fell in the company parking lot, injuring her back. She continued working until July 15, 1991. On that date she bent over to pick up a can weighing approximately thirty to thirty-five (30-35) pounds and experienced a sharp radiation of pain from the middle of her back down her right leg, into her right foot. She was seen by the plant physician, Dr. Sellers, who then referred her to Dr. Estivo. After undergoing a series of diagnostic tests claimant underwent a four level fusion performed by Dr. Estivo. In October, 1992, claimant was returned to work with respondent in an accommodated position as a parts washer. This job required claimant to bend over and pick up parts out of a basket. She was dealing with approximately two hundred fifty (250) parts per hour. Respondent did make some accommodation to claimant's job by raising the level of the basket in order to reduce the amount of bending required. In November, 1992, while working as a parts washer, claimant began experiencing problems with her hands due to the repetitive nature of the job. Eventually claimant developed carpal tunnel syndrome in both hands and was taken off work by Dr. Tanksley who performed surgery on both arms after diagnosing bilateral carpal tunnel syndrome.

Claimant was again returned to work after the carpal tunnel surgeries. On February 12, 1993, while retrieving a part from one of the lower baskets, claimant experienced a sharp shooting pain from the middle of her back up to her neck and down into her low back. Claimant was referred to Dr. Fast, an associate of Dr. Sellers. Claimant was returned to work in June, 1993 with respondent in an accommodated position. This job required claimant sit in a room with several unused chairs, a desk and telephone. Claimant was to call people in the morning after she arrived at work to see if anyone had anything for her to do. Often claimant had nothing to do during her entire eight (8) hour shift, causing claimant to simply sit. During this period of time claimant continued to experience problems with her back. Claimant quit her job with respondent, not wanting to spend her days doing absolutely nothing. The job provided in 1993 by respondent was found by the Administrative Law Judge to be a feeble attempt at accommodation without much forethought and without much realization as to the experience and education of the claimant. The Appeals Board agrees with the analysis of the Administrative Law Judge.

The Appeals Board further agrees claimant has suffered two separate and distinct injuries, one to her back and one to her upper extremities.

Unfortunately the parties elected to forgo testimony from the treating physicians, merely obtaining the testimony of Dr. Ernest Schlachter. Dr. Schlachter rated claimant with a twenty-nine percent (29%) permanent partial impairment of function to the body as a whole as a result of claimant's low back and cervical injuries. She was placed on

permanent limitations of no repetitive bending, twisting, stooping, squatting while working, and was advised to avoid repetitive lifting of more than fifteen (15) pounds and single lifts of twenty-five (25) pounds. Dr. Schlachter also rated claimant at seventeen percent (17%) whole body permanent partial impairment of function from her bilateral carpal tunnel syndrome and restricted claimant from repetitive pushing, pulling, grasping motions and advised claimant avoid vibratory tools, repetitive lifting over ten (10) pounds and single lifts over fifteen (15) pounds with either hand or arm.

In proceedings under the Workers Compensation Act the burden of proof shall be on the claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Claimant's functional impairment to her back is based upon the opinion of Dr. Schlachter, the only health care provider to testify in this matter. Uncontradicted evidence, which is not improbable or unreasonable, cannot be disregarded unless it is shown to be untrustworthy; ordinarily, it is regarded as conclusive. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The Appeals Board finds claimant suffered injury to her low back in Docket No. 176,553 with the most significant injury occurring on July 15, 1991. As a result of this injury, the Appeals Board finds claimant has suffered a twenty-nine percent (29%) permanent partial impairment of function to the body as a whole with the specific restrictions and limitations placed upon her by Dr. Schlachter.

Subsequent to claimant's back surgery she was returned to work with respondent in an accommodated position. While employed at this accommodated position claimant was earning a comparable wage.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

As respondent did return claimant to work at a comparable wage in an accommodated position, the Appeals Board finds claimant is entitled to a functional impairment for the injury suffered to her back on July 15, 1991.

Unfortunately upon claimant's return to her employment with respondent, she developed additional problems in her bilateral upper extremities resulting in carpal tunnel surgery. Subsequent to claimant's bilateral carpal tunnel surgery she was again returned to accommodated work by respondent in June, 1993. As has been noted earlier, this feeble attempt at accommodation by the respondent was a failure. This brief period of

accommodation, in the Appeals Board's opinion, would not qualify under K.S.A. 1992 Supp. 44-510e(a) as engaging in any work for wages comparable to the average gross weekly wage the employee was earning at the time of the injury. As such, the claimant has overcome the presumption contained in K.S.A. 1991 Supp. 44-510e and is entitled to work disability as a result of her injuries suffered with respondent.

The Appeals Board finds claimant suffered injury to her bilateral upper extremities with injury date occurring from October 25, 1992 through and including February 12, 1993, claimant's last day worked before she left her employment to undergo bilateral carpal tunnel surgery. See Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

In granting claimant a work disability under K.S.A. 1991 Supp. 44-510e the Appeals Board finds that claimant, although suffering separate injuries to distinct parts of her body, has, in this circumstance, encountered but one work disability. Claimant's injuries to her back and to her bilateral upper extremities combine to prevent her from returning to her employment with respondent. In computing work disability the Appeals Board must consider the language of K.S.A. 1992 Supp. 44-510e which states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

In determining the extent of permanent partial disability, both a reduction of a claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. Unfortunately the statute is silent as to how this percentage is to be arrived at. It is required that both of the factors be considered in computing work disability. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

In evaluating claimant's loss of access to the open labor market and her loss of ability to earn comparable wages, Mr. Jerry Hardin, the only vocational expert to testify in this matter, concluded claimant had suffered a fifty to fifty-five percent (50-55%) loss of access to the open labor market based upon Dr. Schlachter's restrictions to claimant's back. Mr. Hardin, when considering the restrictions placed upon claimant by Dr. Schlachter because of both her bilateral upper extremity injuries and her back injuries combined found claimant had suffered an eighty-four percent (84%) loss of ability to perform work in the open labor market.

Mr. Hardin also found that claimant's ability to earn a comparable wage had been reduced by fifty-six percent (56%) opining claimant would be able to earn approximately \$200.00 per week. When compared to claimant's average weekly wage of \$532.25, claimant's ability to earn \$200.00 a week equates to a sixty-two percent (62%) loss of ability to earn comparable wages. The Appeals Board finds, based upon claimant's actual preinjury average weekly wage as stipulated by the parties, to have suffered a sixty-two percent (62%) loss of ability to earn a comparable wage. The Appeals Board, in reviewing the claimant's loss of access to the open labor market and claimant's loss of ability to earn comparable wages, must consider both prongs of the work disability test. The statute is

silent as to what emphasis is to be placed upon each prong. See Hughes, *supra*. The Appeals Board sees no compelling reason to place greater emphasis on one prong of the test over the other and thus gives equal weight to each. In combining claimant's eighty-four percent (84%) loss of access to the open labor market and sixty-two percent (62%) loss of ability to earn a comparable wage the Appeals Board finds claimant has suffered a seventy-three percent (73%) permanent partial whole body work disability as a result of injuries suffered to her back and her bilateral upper extremities through February 12, 1993.

The medical records of Dr. Schlachter, specifically Dr. Schlachter's restrictions placed upon claimant, lead to the conclusion that claimant's work disability stems both from her injuries suffered on July 15, 1991 to her low back as well as the microtrauma injuries suffered by claimant through February 12, 1993, her last day wherein she was "legitimately" employed by respondent.

K.S.A. 44-510a(a) states in part:

"If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if settled by lump sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment."

"(b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury. This reduced amount of compensation shall be the total amount payable during the period of time provided in subsection (a), unless the disability awarded is increased under the provisions of K.S.A. 44-528 and amendments thereto."

Claimant suffered accidental injury to her back and cervical spine which resulted in a twenty-nine percent (29%) whole body functional impairment. The Appeals Board awarded claimant this functional impairment in Docket No. 176,553.

Claimant returned to work for respondent and suffered additional injury to her body involving both her back and her upper extremities which resulted in claimant being rendered incapable of returning to work at a comparable wage. The work disability resulting from claimant's multiple injuries stems both from claimant's upper extremity problems and from her back and cervical injuries. As such, the Appeals Board finds the work disability awarded claimant in this matter necessitates the granting of a credit to the respondent pursuant to K.S.A. 44-510a. The Appeals Board finds respondent is entitled to a one hundred percent (100%) credit for the award to claimant as a result of the injuries suffered to her back.

AWARD DOCKET NO. 176,553

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated August 24, 1994, shall be and is hereby amended to read as follows:

Claimant shall be granted an award in accordance with the above findings against respondent, Eaton Corporation, a qualified self-insured, and the Kansas Workers Compensation Fund, for 58.72 weeks temporary total disability compensation at the rate of \$289.00 per week totalling \$16,970.08, followed thereafter by 356.28 weeks permanent partial general body disability at the rate of \$105.68 per week totalling \$37,651.67, for a total award of \$54,621.75, representing a 29% whole body functional impairment.

As of October 12, 1995, there would be due and owing claimant 58.72 weeks temporary total disability compensation at the rate of \$289.00 per week totalling \$16,970.08, followed thereafter by 162.71 weeks permanent partial general body disability at the rate of \$105.68 per week in the amount of \$17,195.19, for a total amount of \$34,165.27, which is due and owing in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 193.57 weeks permanent partial general body disability at the rate of \$105.68 totalling \$20,456.48 until fully paid or until further order of the Director.

AWARD DOCKET NO. 175,654

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR of the claimant, Patsy A. Tharp, and against the respondent, Eaton Corporation, a qualified self-insured, and the Kansas Workers Compensation Fund for an injury occurring on February 12, 1993. Claimant is entitled to 24 weeks temporary total disability compensation at the rate of \$299.00 per week in the amount of \$7,176.00 followed thereafter by 308.43 weeks permanent partial general body work disability at the reduced rate of \$153.35 per week in the amount of \$47,297.74, followed thereafter by 82.57 weeks permanent partial general body work disability at the unreduced rate of \$259.04 per week in the amount of \$21,388.93, representing a 73% permanent partial general body work disability and a total award of \$75,862.67.

As of October 12, 1995, claimant would be entitled to 24 weeks temporary total disability compensation at the rate of \$299.00 per week totalling \$7,176.00, followed thereafter by 114.86 weeks permanent partial general body work disability at the reduced rate of \$153.35 per week in the amount of \$17,613.78, totalling \$24,789.78, which is due in one lump sum minus any amounts previously paid. Thereafter, claimant would be entitled to 193.57 weeks permanent partial general body work disability at the reduced rate of \$153.35 in the amount of \$29,683.96, followed thereafter by 82.57 weeks permanent

partial general body work disability at the unreduced rate of \$259.04 in the amount of \$21,388.93 until fully paid or until further order of the Director.

Claimant is further entitled to future medical expense upon proper application to and approval by the Director.

Claimant is further entitled to unauthorized medical expense of up to \$350.00 upon presentation of proper itemization of same.

The Appeals Board further finds claimant's attorney fee contract is reasonable and approves same so long as it is not in contravention to K.S.A. 44-536.

Further a lien is placed against the Award in the amount of 25% pursuant to K.S.A. 44-536 in favor of claimant's attorney Mr. Tom E. Hammond.

Respondent is further entitled to reimbursement from the Kansas Workers Compensation Fund in both Docket Nos. 175,654 and 176,553 pursuant to the stipulated agreements between the parties.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and the Kansas Workers Compensation Fund with reimbursement of 33% by the Kansas Workers Compensation Fund to the respondent to be paid as follows:

OWENS, BRAKE & ASSOCIATES	
Transcript of Proceedings	\$358.30
dated March 10, 1994	
KELLEY, YORK & ASSOCIATES, LTD.	
Deposition of Jerry D. Hardin	\$311.00
dated March 15, 1994	
Deposition of Dr. Ernest Schlachter	\$223.59
dated March 28, 1994 4:38 PM	
Deposition of Dr. Ernest Schlachter	\$197.39
dated March 28, 1994 5:04 PM	
Total	\$731.98
DON K. SMITH & ASSOCIATES	
Deposition of Kurt Langel	\$154.00
dated May 11, 1994	
Deposition of Vickie Martin	\$162.50
dated May 11, 1994	
Total	\$316.50

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Tom E. Hammond, Wichita, Kansas
Edward D. Heath, Jr., Wichita, Kansas
Scott J. Mann, Hutchinson, Kansas
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director